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ROYDEN (M) SDN. BHD.

v.

SYKT. PEMBENAAN YEOH TIONG LAY SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

LIM BENG CHOON J

b

[SUIT NO. S7-23-193-87]

3 OCTOBER 1991

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CONTRACT: *Main contract between employer and defendant contractor - Sub-contracts between defendant and plaintiff sub-contractor - Failure by defendant to pay progressive payments to plaintiff - Clause in main contract as to condition of payment - Whether same clause incorporated into sub-contract - General common law rule - Privity - Intention of parties - Construction of clauses of sub-contract - Allegation of delay and defective works - Lack of evidence to support allegations.*

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The defendant (PYT) was employed by CS (the employer) as a main contractor for the construction of a condominium project (the project). Pursuant to a sub-contract dated 6 August 1984 (the 1st sub-contract) PYT in turn appointed the plaintiff (R) as a sub-contractor to supply and instal air-conditioning and ventilation systems for the project by way of a sub-contract. By another sub-contract entered into between R and PYT on the same date (the 2nd sub-contract), R was appointed by PYT to supply and instal lift services for the project.

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R claimed that PYT had failed or refused to pay R certain progressive payments which had been duly certified by the authorised architect of the project. R applied for final judgment and PYT applied for a stay of the proceedings pursuant to s. 6 of the Arbitration Act 1952, as it was alleged that there was an arbitration clause in clause 22 of both sub-contracts. PYT had terminated the main contract with the employer as it had disputed the amounts claimed under payment certificates Nos. 14, 18 and 20, which dispute it had referred to arbitration under clause 34 of the main contract.

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PYT denied liability and submitted that:

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(a) the payments under certificate Nos. 14, 18 and 20 had not been made by CS. Since clause 27(a)(vii) of the main contract provided that payment would only be made within 14 days after PYT received from CS the amounts claimed, PYT denied that it was indebted to R for the disputed sum and

(b) that PYT is entitled to be indemnified by R in relation to loss or damage suffered by PYT arising from the late completion by R of the sub-contract works as well as defective works carried out by R; PYT is therefore entitled to set-off against R's claim and PYT is also entitled to a cross-claim for damages.

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R argued that it had completed the works within the time extended by PYT and that all defects had been rectified within the defect liability period.

R was granted final judgment against PYT. Hence this appeal by PYT.

Held:

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[1] The provisions of clause 27(a)(vii) were not expressly incorporated into the two sub-contracts. Bearing in mind the general common law rule that there is no privity of contract between the employer and the sub-contractor, it is necessary to examine the two sub-contracts to find out whether R and PYT intended to import clause 27(a)(vii) into the said sub-contracts.

[2] Reading the sub-contracts as a whole, it cannot be seen how clause 27(a)(vii) of the main contract had been incorporated into and formed part of the sub-contracts. On the contrary, clause 2 of the sub-contract only required R to observe and perform all the provisions of the main contract so far as they were related and applicable to the sub-contract works and were not repugnant to or inconsistent with the express provisions of the sub-contract. To incorporate clause 27(a)(vii) of the main contract into the sub-contracts would be repugnant to or inconsistent with the express provisions of clause 11(b) of the main contract.

[3] On the facts of this case, R was entitled to be paid regardless of clause 27(a)(vii) of the main contract.

[4] PYT had advised all the sub-contractors that the handing over date was as scheduled on 15 July 1985. In addition, there is no evidence that the architect had issued any certificate under proviso to clause 8(a) of the sub-contract which would have entitled PYT to claim for loss or damage as a result of R's delay if the architect had issued to PYT, a certificate in writing stating that in his opinion the sub-contract works ought reasonable to have been completed within specified periods (with a duplicate copy to R). There is also no evidence that R had failed to rectify the defective works within the defective period.

[Defendant's appeal dismissed with costs.]

Cases referred to:

Brightside Mechanical and Electrical Services Group Ltd. & Anor. v. Hyundai Engineering & Construction Co. Ltd. [1988] 2 CLJ (Rep) 712 (**dist**)
Chandler Bros Ltd. v. Bosewell [1936] 3 All ER 179 (**cons**)
Dunlop & Ranken Ltd. v. Hendall Steel Structures [1957] 1 WLR 1102 (**cit**)
Hampton v. Glamorgan CC [1917] AC 13 (**cit**)

Legislation referred to:

Arbitration Act 1952, s. 6
 Rules of the High Court 1980, O. 14

For the plaintiff - Azhar Azizan; M/s. Allen & Gledhill
For the defendant - F. Dorairaj; M/s. Nahappan & Peri

JUDGMENT

Lim Beng Choon J:

The defendant was employed by Cosmopleks Sdn. Bhd. (the employer) as the main contractor for the construction of a project known as Raintree terrace 12 units luxury condominium apartments at Jalan Wickham, Kuala Lumpur (the project). By a sub-contract agreement dated 6 August 1984 (the 1st sub-contract) entered between the plaintiff and the defendant, the latter appointed the former as a sub-contractor to supply and instal air-conditioning and ventilation systems for the project. By another sub-contract agreement dated the same date (the 2nd sub-contract) entered into by the same parties the plaintiff was again appointed as a sub-contractor to supply and instal lift services for the project. The plaintiff alleged that the defendant had failed or refused to pay the plaintiff certain progressive payments notwithstanding that such payments were duly certified by the authorised architect of the project. Hence the plaintiff instituted this civil suit on 11 February 1987 against the defendant.

In its writ endorsed with a statement of claim the plaintiff gave particulars of the progressive payments which had been duly certified by the architect which can be summarised as follows:

- a** (a) 1st sub-contract:
architect's certificates of payment Nos. 14, 18 & 20 totalling RM332,013.60.
- (b) 2nd sub-contract:
architect's certificates of payment Nos. 9, 10, 11, 13 & 20 totalling RM56,250.
- b** The plaintiff therefore claimed for an amount of RM388,263.60 with interest at the rate of 8% per annum from the date of judgment until the date of full settlement thereof and costs.
- c** After the defendant had entered appearance on 3 March 1987, the plaintiff made an application by way of summons-in-chambers dated 18 March 1987 for leave to enter final judgment for the aforesaid amount pursuant to O. 14 of the Rules of the High Court 1980 (RHC). In the supporting affidavit affirmed by Kan Tong Seng (Kan) the accountant of the plaintiff it was asserted that the defendant was at the commencement of this action and still is justly and truly indebted to the plaintiff in the sum of RM388,263.60 in respect of work done and services rendered and performed by the plaintiff pursuant to the two sub-contract agreements dated 6 August 1984. The plaintiff then went on to state the manner in which the plaintiff was appointed as sub-contractor and gave the particulars of the outstanding certified amount of RM388,263.60 due and payable to the plaintiff by the defendant. The particulars given were the same as averred in the plaintiff's statement of claim.
- d** In response to the plaintiff's application for an O. 14 judgment, the defendant applied by way of summons-in-chambers on 10 July 1987 for an order that all further proceedings in the civil suit be stayed pursuant to s. 6 of the Arbitration Act 1952 as the plaintiff and the defendant by the sub-contracts agreed that matters in respect of which this action was brought be referred to arbitration. In the supporting affidavit affirmed by Gan Ching Lim (Gan) affirmed on 20 May 1987 (which must be read with the corrective and further affidavit of Gan affirmed on 6 August 1987 as in this affidavit Gan made some corrections to his earlier affidavit) it was asserted that clause 22 of the two sub-contracts provided:
- e** That in the event of any dispute or difference between the contractor and sub-contractor whether arising during the execution or after the completion or abandonment of the sub-contract works or after the determination of the employment of the sub-contractor under this sub-contract (whether by breach or in any other manner) in regard to any matter or thing of whatsoever nature arising out of this sub-contract or in connection therewith then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to arbitration...
- f**
- g** The defendant then went on to say that the matter in dispute was the precise amount of damages outstanding or to be set-off by the defendant for substantial delay and defective works carried out by the plaintiff and other damages following therefrom. In proof of the delay caused by the plaintiff it was asserted that pursuant to the sub-contract the completion date was 20 October 1984 and that of the 2nd sub-contract was 8 December 1984. Due to the plaintiff's delay the certificate of practical completion was only granted to the plaintiff on 15 August 1985 and the employer also imposed liquidated and ascertained damages amounting to a sum of RM377,500.
- h** To counter the allegations as stated in Gan's abovementioned affidavit, the plaintiff submitted an affidavit-in-reply affirmed by Kan on 7 August 1987. It was asserted *inter alia* in Kan's affidavit-in-reply that although the sub-contract works were originally supposed to be completed within the period as mentioned in Gan's affidavit, the defendant, however, had at a meeting held on 8 July 1985 granted an extension of time in respect of the handing over of the works to 15 July 1985. The plaintiff had accordingly completed the sub-contract works
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well within the extended time. As regards to the defective works, the plaintiff did rectify all defects well within the defect liability period which only expired on 14 August 1986. Apart from the fact that the defendant had not made any counterclaim against the plaintiff for any alleged delay or defective work, the plaintiff also had not received any notification from the architect regarding any complaint of whatsoever nature. The defendant was accused of making up a sham counterclaim or claim for set-off which had no basis at all.

Finally the defendant filed in another affidavit affirmed on 4 November 1988 by Yeoh Seok Hong (Yeoh), the executive director of the plaintiff. It was asserted *inter alia* that as far as the 2nd sub-contract was concerned the defendant had fully made payment to the plaintiff in respect of payment certificates Nos. 9, 10, 11 & 13. As regards to payment certificates Nos. 14 & 18 the employer only made part payment of the amount claimed under the said payment certificates. The employer disputed the sum claimed under payment certificate No. 14 and in respect of payment certificate No. 18 the employer deducted a sum of RM292,500 as liquidated and ascertained damages for the delay in completing the works from the amount which was to be paid under the said payment certificate No. 18. As to the payment certificate No. 20 the employer had failed or refused to make the payment. As a result the defendant had terminated the main contract with the employer and the disputes relating payment in respect of payment certificates Nos. 14, 18 & 20 had been referred to arbitration pursuant to clause 34 of the main contract on the grounds that:

- (i) There had been wrongful deduction by the employer of payment certificates Nos. 14 & 18
- (ii) There had been wrongful withholding of payment under payment certificate No. 20.

The defendant therefore denied that the defendant was indebted to the plaintiff for the sum of RM388,263.60 for the following reasons:

- (a) Clause 27 (a) (vii) of the main contract specially provided that payment would be made only within 14 days after the receipt by the defendant from the employer of the amounts stated in the architect's certificate. It was clear that payments were not made by the employer in respect of the amount certified in payment certificates Nos. 14 & 18;
- (b) The very fact that payment certificates Nos. 14 & 18 were being re-opened in arbitration certainly meant that the amounts claimed thereunder were uncertain at the material time;
- (c) As regards to payment certificate No. 20, this was again under arbitration because the employer had failed to make payment due thereunder.

The defendant again reiterated that payments in respect of payment certificates Nos. 9, 10, 11 & 13 had been fully paid to the plaintiff by the defendant and the relevant payment voucher was produced and annexed in Exhibit "YSH3" to Yeoh's affidavit.

The application of the plaintiff for an O. 14 judgment was heard by the Senior Assistant Registrar (the SAR) who on 7 November 1988 found for the plaintiff and directed that final judgment be entered against the defendant for the sum of RM388,263.60 together with interest and costs appearing in the statement of claim. Being dissatisfied with the decision of the SAR the defendant gave notice of appeal against the decision of the SAR.

From my summary of the several allegations and counter allegations contained in the affidavits filed on behalf of the plaintiff and the defendant respectively, it is clear that there are two main issues raised by the defendant:

- a* (1) The defendant is not liable under clause 27(a)(vii) of the main contract entered between the defendant and the employer read with the letter of the defendant confirming the appointment of the plaintiff as sub-contractor and certain clauses in the sub-contract to pay the amounts certified by the payment certificates 14, 18 & 20 as the defendant has not received from the employer the sums included in the said payment certificates;
- b* (2) The defendant is entitled to be indemnified by the plaintiff in respect of loss or damage suffered by the defendant arising from the late completion by the plaintiff of the sub-contract works as well as from defective works carried out by the plaintiff and hence the defendant is entitled to a set-off against the plaintiff's claim and the defendant is entitled to a cross-claim damages.

c In considering issue (1) it is appropriate to set out the provisions of clause 27(a)(vii) of the main contract which are as follows:

That payment in respect of any work, materials or goods comprised in the sub-contract shall be made within 14 days **after receipt by the contractor from the employer of the amounts stated in any architect's certificate** under clause 30 of these conditions which includes an amount due to the nominated sub-contractor under the sub-contract. (emphasis supplied)

- d* In addition, the defendant in its letter dated 21 April 1984 (see Exhibit "GCL4" annexed to Gan's affidavit affirmed on 20 May 1987) affirming the appointment of the plaintiff as nominated sub-contractor, stated *inter alia* that the sub-contract of the plaintiff was "subject to the main and sub-contract conditions". However that may be in the two sub-contracts (the wordings of which are identical) subsequently drawn up and executed by the defendant and the plaintiff, the provisions of clause 27(a)(vii) of the main contract were not expressly stated therein. It must therefore be borne in mind that the general rule under the common law is that there is no privity of contract between the employer and the sub-contractor (see for instance *Hampton v. Glamorgan CC* [1917] AC 13). This proposition is of course subject to the terms and conditions stipulated in the sub-contract which may expressly or implicitly make it subject to the conditions of the main contract. In the present case it is therefore necessary to scrutinise the two sub-contracts executed by the plaintiff and the defendant to find out whether the intention of the plaintiff and the defendant was to import the said clause 27(a)(vii) into the said sub-contracts. (See *Dunlop & Ranken Ltd. v. Hendall Steel Structures* [1957] 1 WLR 1102). That being the case an in-depth scrutiny of the relevant clauses of the two sub-contracts is essential. The second recital speaks of the sub-contractor having had the opportunity of inspecting the main contract. The operating provisions of the sub-contract relevant to this issue are clause 1 which provides that the sub-contractor would be deemed to have notice of all the provisions of the main contract with certain exceptions which are
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- g* not relevant to this issue. Clause 2 requires the sub-contractor to observe and perform all the provisions of the main contract so far as they were related and applicable to the sub-contract works and were not repugnant to or inconsistent with the express provisions of the sub-contract. The provisions to clause 3 emphasised that nothing in the sub-contract would create any privity of contract between the sub-contractor and employer or any other sub-contractor. Clause 3(a) required the contractor subject to the main contract from time to time to apply to the architect for certificates of payment and for the inclusion therein of the amount which at the date fairly represented the total value of the sub-contract works and of any variation. Then we have the important provisions in sub-clause (b) of clause 11 which reads:
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(b) Within fourteen days of the receipt by the contractor of any certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of any contracts ascertained under clause 8(c) hereof less:

(i) Retention money that is to say the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract; and

(ii) The amounts previously paid.

Bearing in mind the no privity of contract principle and reading the sub-contract as a whole I cannot see how could one say that clause 27(a)(vii) of the main contract had been incorporated into and formed part of the sub-contract. On the contrary clause 2 of the sub-contract only required the plaintiff to observe and perform all the provisions of the main contract so far as they were related and applicable to the sub-contract works and **were not repugnant to or inconsistent with the express provisions of the sub-contract**. Thus in *Chandler Bros Ltd. v. Boswell* [1936] 3 All ER 179 the sub-contract there contained many provisions in similar terms to those in the main contract but none referring to or incorporating a power in the main contract of the engineers to require the removal of a sub-contractor with whom they were dissatisfied. The sub-contractor was delayed by lack of funds and the engineers served a notice under the main contract. It was held *inter alia* that a recital that the sub-contractor had agreed to carry out the work in accordance with terms of the main contract did not, where other clauses were expressly included incorporate the clause in question. In the present case the plaintiff's contention that clause 27(a)(vii) of the main clause had not been imported into the sub-contract stands on firmer ground because to do so would be repugnant to or inconsistent with the express provisions of clause 11(b) of the sub-contract which clearly required the main contractor to inform and pay the sub-contractor within 14 days upon receipt of the payment certificate issued by the architect. Counsel for the defendant drew my attention to the case of *Brightside Mechanical and Electrical Services Group Limited & Anor. v. Hyundai Engineering & Construction Co. Ltd.* [1988] 2 CLJ (Rep) 712 a Singapore case where L.P. Thean J held that the plaintiffs sub-contractor were not entitled to be paid until the owner had paid the defendants the sum claimed by the plaintiffs. It must be noted that wordings used in clause 11 in the sub-contract in that case were different from clause 11 in the sub-contract in the present case. First clause 11(a) of the sub-contract in the Singapore case provided that on an application made by the main contractor to the architect for a payment certificate the architect would and **subject to the terms of the main contract** issue a certificate of payment. The use of the words emphasised by me to my mind suggested that the obligation of the defendant to pay the plaintiff was not absolute but only in accordance with the terms of the main contract. Furthermore clause 11(b) of the sub-contract in the Singapore case spoke of the defendants "shall within fourteen days of the receipt by the contractor of **sum included in any certificate of the architect** notify and pay to the plaintiffs." To me it is clear that L.P. Thean J construed the words emphasised by me in the said clause 11(b) in the context of clause 11(a) which I have reproduced earlier. When read in this way it is inevitable that the learned Judge observed:

I now turn to clause 11(b) of the sub-contract. It is significant to note that the material part of clause 11(b) of the sub-contract, namely: Within five days of the receipt by the contractor of the sum included in any certificate of the architect the contractor shall ... pay ... is slightly different from and in my view more explicit than the corresponding part of clause 11(b) of the sub-contract in *Hong Kong Teakwood* case which is as follows: 'Within 14 days of receipt by the main contractor of payment from the employer against any certificate from the architect, the main contractor shall ... pay ...'

a What is more important, however, is that there is no suggestion in the *Brightside Mechanical & Electrical Services Group Ltd.* case that the sub-contract in that case had provisions similar to the provisions in clause 2 of the sub-contract in the present case. The Singapore case is clearly distinguishable. I am, therefore, satisfied that the plaintiff is entitled to be paid regardless of clause 27(a)(vii) of the main contract.

b Turning to issue (2) I shall deal first with the question of delay on the part of the plaintiff. It is to be noted that it was the defendant who without any reservation conveyed to all the sub-contractors of the project that the handing over date was as scheduled on 15 July 1985 and not insofar as the plaintiff is concerned, on 20 October 1984 in respect of the 1st sub-contract and 8 December 1984 in respect of the 2nd sub-contract as originally agreed. (see Exhibit "KTS2" annexed to the affidavit-in-reply of Kan affirmed on 7 August 1987). In any event under the sub-contract the defendant would be entitled to claim any loss or damage caused by the delay on the part of the plaintiff if and only if the defendant's cross claim for loss or damage comes within the provisions of the proviso to clause 8(a) which reads:

Provided that the contractor shall not be entitled to claim any loss or damage under this clause unless the architect shall have issued to the contractor (with a duplicate copy to the sub-contractor) a certificate in writing stating that in his opinion the sub-contract works or the relevant section thereof ought reasonably to have been completed within the specified period or within any extended period or periods as the case may be.

d Here there is no evidence that the architect had issued any certificate under the said proviso. It is therefore futile for the defendant to assert that it is entitled to a cross claim for delay on the part of the plaintiff in completing the sub-contract works. Furthermore in the weekly progress report No. 60 (period: 29 May 1985 to 4 June 1985) it showed that the plaintiff had completed 100% of the air-conditioning installation and also the lift installation except testing which had been carried out up to 90% (see Exhibit "KTS3 annexed to the affidavit-in-reply of Kan). As regards to the defective works, it is again to be noted that the defects liability period would only expire on 14 August 1986. There is not a single document in the exhibits annexed to the affidavits of the plaintiff or the affidavits of the defendant to show that the plaintiff had failed to rectify the defective works well within the defective period. On the contrary some of the documents clearly showed that the plaintiff had completed the defective works well before 14 August 1986. Again the purported cross claim under issue (2) must surely fail.

The appeal of the defendant is dismissed with costs. The order of the SAR is confirmed.

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Also found at [1991] 3 CLJ 2935

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